IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. DAVID D. SYKES, Appellant.	No. 38758-1-II UNPUBLISHED OPINION

Penoyar, A.C.J. — David Sykes appeals his custodial assault conviction. He argues that a witness gave improper opinion testimony and that his trial counsel was ineffective for not objecting to that testimony. We affirm.[1]

facts

On January 24, 2008, Sykes was an inmate confined at Stafford Creek Correctional Facility. Corrections Officers Neil Bennett and James Huston went to Sykes's cell to retrieve a meal tray. When they opened the cuff port to the cell, Sykes reached through the port and, using a plastic cup, threw a liquid substance on Bennett's face and body. Sykes reportedly then said "a-ha. I got you." Report of Proceedings (RP) (Dec. 9, 2008) at 25.

The State charged Sykes with custodial assault. During his cross examination, Bennett testified as follows, without objection:

> Q. Does your report indication that he made two separate throwing motions?
>
> . . . .
>
> A. Well, I don't remember if it was in the report, but he did make two throwing motions. I believe my report would have said that he assaulted me by throwing a liquid substance on me.

[1] A commissioner of this court initially considered Sykes' appeal as a motion on the merits under RAP 18.14 and then transferred it to a panel of judges.

> Q. So, at that time you wrote your report, you didn't think it was important to mention that he made two separate motions?
> A. The assault is what's important.
> Q. And also, the statement, the statement that you said today that [Sykes] made, did you put that in your report?
> . . . .
> A. I didn't find it important, the fact that he may assault me is what's important.

RP (Dec. 9, 2008) 31-32.

Sykes did not testify. His counsel argued that he accidentally struck Bennett with the liquid substance. The jury found Sykes guilty as charged.

Sykes argues that by using the term "assault," Bennett gave improper opinion testimony on the ultimate question of his guilt. *See State v. Black*, 109 Wn.2d 336, 348, 745 P.2d 12 (1987); *see also State v. Easter*, 130 Wn.2d 228, 242, 922 P.2d 1285 (1996). He contends that he may raise this issue for the first time on appeal because the testimony was a manifest error affecting his constitutional right to an unbiased jury. *City of Seattle v. Heatley*, 70 Wn. App. 573, 577, 854 P.2d 658 (1993).

"To determine whether statements are impermissible opinion testimony, a court will consider the circumstances of a case, including, '(1) the type of witness involved, (2) the specific nature of the testimony, (3) the nature of the charges, (4) the type of defense, and (5) the other evidence before the trier of fact.'" *State v. King*, 167 Wn.2d 324, 332-33, 219 P.3d 642 (2009) (quoting *State v. Kirkman*, 159 Wn.2d 918, 928, 155 P.3d 125 (2007)) (interior quotations omitted). In this case, Bennett testified that Sykes "assaulted" him. RP (Dec. 9, 2008) at 31. Sykes's defense was that he accidentally hit Bennett with the substance in the cup and so did not intentionally assault him. The jury also heard testimony from Officer Huston, describing Sykes's

actions, and Bennett's report that Sykes said "a-ha. I got you" after the substance hit Bennett. RP (Dec. 9, 2008) at 25. The question for the jury was whether Sykes intentionally assaulted Bennett with the substance, not whether or not Sykes hit Bennett with the substance. Bennett's use of the term "assault" is unlike the opinion testimony in *Black*, 109 Wn.2d at 348, (testimony that the alleged victim suffered from "rape trauma syndrome" in a rape case), *Easter*, 130 Wn.2d at 242, (testimony that the defendant was a "smart drunk" in a vehicular assault case) or *King*, 167 Wn.2d at 332-33, (testimony that defendant's driving was "reckless" in a reckless driving case). The term "assault," in this context, does not contain the same evaluative character as the terms "rape trauma syndrome," "smart drunk," or "reckless" driving. Under these circumstances, Bennett's use of the term "assault" was not impermissible opinion testimony.

Alternately, Sykes argues that his trial counsel was ineffective because he elicited (or at least did not object to) Bennett's testimony about having been assaulted. To establish ineffective assistance of counsel, Sykes must demonstrate that his counsel's performance fell below an objective standard of reasonableness and that as a result of that deficient performance, the result of his case probably would have been different. *State v. McFarland*, 127 Wn.2d 322, 335-36, 899 P.2d 1251 (1995); *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Sykes demonstrates neither. Objecting to Bennett's use of the term "assault" might well have brought more attention to that testimony, so not objecting to it was within the range of an objective standard of reasonableness. There is no reasonable probability that the result of Sykes's trial would have been different had his counsel objected to Bennett's use of the term "assault." Sykes does not demonstrate ineffective assistance of counsel.

We affirm.

A majority of the panel has determined that this opinion will not be printed in the Washington Appellate Reports but it will be filed for public record. RCW 2.06.040.

Penoyar, A.C.J.

We concur:

Hunt, J.

Quinn-Brintnall, J.